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January 20, 1999

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JAN 22 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, SW
Washington, DC 20554

Re: Application for Consent to the Transfer of Control of Licenses and
Section 214 Authorizations from Tele-Communications, Inc.
Transferor, to AT&T Corp., Transferee, CS Docket 98-178

Dear Ms. Salas:

Enclosed please find two copies of our letter submitted to FCC Chairman,
William E. Kennard regarding the above mentioned proceeding.

Please return a date-stamped copy of the enclosed copy. Thank you.

Sincerely,

Jane Kunka
Manager, Public Policy

Enclosures

No. of Copies rec'd 42
List A B C D E



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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE CLERK

January 20, 1999

BY HAND DELIVERY

The Honorable William E. Kennard
Chairman
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Ex Parte – AT&T/TCI Merger Proceeding
CS Docket No. 98-178**

Dear Chairman Kennard:

I am writing to share the concerns of Qwest Communications Corporation (“Qwest”) regarding the procedure by which the Commission is considering the merits of the proposed transfer of control of various FCC licenses and authorizations from Tele-Communications, Inc. (“TCI”) to AT&T Corporation (“AT&T”) (together, the “Applicants”) in the above-referenced docket. Specifically, Qwest respectfully submits that the Commission’s continuing failure to permit interested parties to review *all* information submitted by AT&T and TCI to the Commission in connection with the proposed transfer of control – including all materials submitted to the Department of Justice (“DOJ”) in connection with its Hart-Scott-Rodino review – will result in any decision issued by the Commission in this proceeding being fatally flawed and subject to vacation and remand by a reviewing court.

As you may know, this issue has been raised by several interested parties during the pendency of this proceeding. Notably, on October 14, 1998 SBC Communications Inc. (“SBC”) filed a motion with the Commission requesting that the Applicants be required to provide to the FCC all HSR documents already filed with DOJ, and to make those documents available to the parties for review and comment, subject to appropriate protective arrangements. In its motion SBC explained that a thorough public interest analysis of the competitive effects of the merger demands an examination of the business plans and other documents included in those HSR materials, and demonstrated that in each of the recent major mergers considered by the

Commission, the agency required the applicants to provide access to the HSR materials filed with DOJ.¹ Seven weeks later, on December 7, 1998 U S West, Inc. ("U S West") filed a motion requesting that the Commission expedite its ruling on the SBC motion. U S West's motion was motivated both by the Commission's lack of action with regard to the SBC motion, and, more importantly, by the fact that AT&T apparently has, at the Commission's request, made the HSR documents available for review exclusively by the Commission.² As of today, the Commission has taken no action with regard either to U S West's motion or SBC's motion.

Qwest understands that, despite the motions filed by SBC and U S West and the urging of parties supporting these motions, the Commission may allow interested parties to review some of those HSR documents submitted by the Applicants, but *only* those documents it may rely on in its decision regarding the merger, and only *after* its decision has been made. As Qwest has emphasized, however, both in its initial comments filed in this proceeding and in comments filed in support of U S West's motion, the Commission cannot make the requisite public interest finding to approve a proposed transfer of control without *first* allowing for review of and comment on *all* relevant information by all interested parties.

Quite simply, the public interest demands that the Commission permit the parties to review all of the HSR documents filed with the Commission – not just those documents the Commission's own analysis deems to be relevant – so that the parties may evaluate and comment on all of the available relevant material related to the applications. Only in this manner can the parties make thorough evaluations of the competitive effects of the merger, and hence contribute to the creation of a complete and accurate record on which the Commission may base its ultimate decision. It is quite possible that parties actually competing with AT&T or TCI in the marketplace will find relevance in information which is not apparent to the Commission on its own review. Qwest would stress in this regard that regardless of the Commission's ultimate judgment of the value and relevance of the HSR materials, principles of reasoned decision-making require that all interested parties have the opportunity to assess that same information and offer the Commission, for its consideration, their independent review of the information (including its relevance). That is, even if the Commission were to determine that none of the HSR material is relevant to its public interest evaluation of the merger, any such determination must take into account the analysis and comments of all of the parties.

The Commission consistently has recognized the importance, and, indeed, the necessity of such a complete, thorough, and detailed review by the Commission and all interested parties of all available relevant information – including the HSR materials – in connection with proposed transfers of control. While it is true that in its review of the proposed merger DOJ examined these same materials, the Commission's inspection in this proceeding of these documents, supplemented by public review and comment, can in no way be considered

¹ See Motion of SBC Communications Inc. to Require Review of Hart-Scott-Rodino and Other Documents, at 2-7 (filed Oct. 14, 1998).

² See Motion of U S West to Expedite Ruling on Motion to Require Applicants to Provide Interested Parties with Access to Hart-Scott-Rodino Documents, at 3-4 (filed Dec. 7, 1998).

redundant. The scope of DOJ's review of a proposed merger is far more narrow than is the FCC's, and pursuant to the Sherman and Clayton Acts is limited to a determination of whether the merger will "lessen competition" or "tend to create a monopoly."³ The FCC's public interest standard "necessarily subsumes and extends beyond the traditional parameters of review under the antitrust laws," and, specifically, includes a determination of whether the merger "will enhance competition."⁴

Consistent with this standard, and as parties have pointed out, in the last three major mergers it reviewed the Commission required that HSR materials already considered by DOJ be submitted for public review and comment. There is no rational basis for failing to treat the proposed AT&T/TCI merger any differently from the SBC/Ameritech merger, the MCI/WorldCom merger, or the Bell Atlantic/NYNEX merger. Indeed, as Qwest noted in its initial comments, the Commission has required AT&T to produce HSR materials in prior merger proceedings in which it was a party, and which involved proposed transfers of far less competitive significance.⁵ Further, AT&T itself has been a leading proponent of HSR disclosure in two of those merger proceedings.⁶ There is no justification for a departure in this proceeding from the Commission's consistent practice with regard to these other mergers.

AT&T's apparent acquisition of *exclusive* use of the TCI broadband loops is of particular concern. This threat is exacerbated by AT&T's reported additional arrangements to obtain *exclusive* access to the cable loops of several other companies. This freezing out of AT&T's competitors from use of the cable loop for their "last mile" broadband needs is anti-competitive and against the public interest. The HSR materials may shed light on AT&T's plans in that regard.

Qwest notes that on December 30, 1998 the Commission adopted a protective order in this proceeding to ensure that any confidential or proprietary documents submitted by the

³ 15 U.S.C. §§ 1-7, 18 *et seq.*

⁴ *In the Matter of the Merger of MCI Telecommunications Corp. and British Telecommunications PLC*, 12 FCC Rcd 15351, ¶ 3 (1997); *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19985, ¶ 2 (1997).

⁵ *See Applications of Craig O. McCaw, Transferor, and American Tel. & Tel. Co., Transferee, For Consent to Transfer Control*, 9 FCC Rcd 5836, ¶ 6 (1994).

⁶ *See Proposed Merger of Bell Atlantic Corp. and NYNEX Corp.*, Petition of AT&T Corp. to Deny or, in the Alternative, to Defer Pending Further Investigation and Briefing, File No. NSD-L-96-10 (filed Sept. 23, 1996), at 29; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation to SBC Communications, Inc.*, CC Docket No. 98-141, Order Adopting Protective Order, DA 98-152, ¶ 4 (rel. Oct. 2, 1998) (noting that AT&T filed comments supporting the proposed protective order).

Applicants are afforded adequate protection.⁷ Qwest understands that this protective order was adopted in contemplation of AT&T's plan to submit certain additional information regarding the deployment of telephony capabilities within the upgraded AT&T/TCI network, which, correspondingly, is in response to various questions posed by the Commissioners at an *en banc* hearing held on December 19, 1998.⁸ Although it would appear, based on the language of this order, that the Commission still does not intend to release the HSR documents for review and comment, Qwest submits that the terms and conditions of the protective order quite easily and appropriately could be applied to *all* materials submitted to the Commission by the Applicants, including the HSR materials.

In sum, Qwest continues to urge the Commission to act expeditiously in response to the motions filed by SBC and U S West and permit public review of and comment on the HSR materials that have been or will be submitted to the Commission by the Applicants. Again, Qwest respectfully submits that any order approving the merger without the benefit of the parties' analysis of all relevant materials cannot constitute a thorough examination of the competitive implications of the proposed transfer of control, and hence cannot serve the public interest.

Thank you for your attention to and consideration of these concerns.

Sincerely,



Drake S. Tempest
Executive Vice President and General Counsel
Qwest Communications Corporation

cc: Commissioner Ness
Commissioner Tristani
Commissioner Powell
Commissioner Furchtgott-Roth
Kathryn Brown, Chief of Staff
Christopher Wright, General Counsel
Larry Strickling, Chief, Common Carrier Bureau
Deborah Lathen, Chief, Cable Services Bureau
Royce Dickens, Cable Services Bureau
ITS

⁷ See *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, CS Docket No. 98-178, Order Adopting Protective Order, ¶ 1 (rel. Dec. 31, 1998).

⁸ See *id.*